IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

WEDNESDAY, THE 11TH APRIL 2007 / 21ST CHAITHRA 1929

A.S.No.376 of 1993(C)

O.S.NO.120/1990 OF THE COURT OF THE SURORDINATE JUDGE OF OTTAPALAM.

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APPELLANT/1ST DEFENDANT:-

C.RADHA, W/O.GOPALAN NAIR, SUSHAMA NIVAS,
MEZHATHUR AMSOM AND DESOM, P.O.MEZHATHUR,
OTTAPALAM TALUK, PALGHAT DT.

BY ADV. SRI.V.R.VENKATAKRISHNAN (SR.)
SRI.N.C.JOSEPH.

RESPONDENTS/PLAINTIFF & DEFENDANTS 2 AND 3:-

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1. P.VIJAYALAKSHMI, W/O.KUTTAN NAIR, ANUGRAHA,
   MEZHATHUR AMSOM & DESOM, P.O.MEZHATHUR,
   OTTAPALAM TALUK, PALGHAT DISTRICT.

2. PUNNATHUR THULASI DAS RAJA,
   S/O.DEVAKI ALIAS ANUJATHI THAMBURATTY,
   PUNNATHUR MADHAM, KUMBLANGAD, KANHIRAKKODE.

3. M.V.SIDDIQUE, S/O.CHEKKUTTY, MELAPPAT VALAPPIL,
   MEZHATHUR AMSOM AND DESOM,
   OTTAPALAM TALUK, PALGHAT DT.

R1 BY ADV.SRI.P.N.RAVINDRAN
SMT.PREETHI KARUNAKARAN.

THIS APPEAL SUIT HAVING BEEN FINALLY HEARD ON 11/04/2007, ALONG WITH A.S.NO.220 OF 1994, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.Padmanabhan Nair,J.

A.S.Nos.376 of 1993-C & 220 of 1994

Dated, this the 11th day of April, 2007

JUDGMENT

These two appeals arise from a common judgment and decree passed in O.S.Nos.120 of 1990 and 34 of 1991 by the Subordinate Judge, Ottapalam. A.S.No.376 of 1993 is filed by the 1st defendant in O.S.No.120 of 1990. A.S.No.220 of 1994 is filed by defendants 1 and 2 in O.S.No.34 of 1991. A.S.No.220 of 1994 was initially filed before the District Court, Palakkad as A.S.No.176 of 1993 and subsequently withdrawn to this Court as both these appeals arise from a common judgment.

A.S.No.376 of 1993:

2. This appeal arises from the decree passed by the Court below in O.S.No.120 of 1990, by which a decree for dissolution of the firm 'Anaswara Furniture Company, Mezhathur' and for division of the ¼ share each of the sharers of the trade assets and property of the firm by settlement of accounts by the appellant-1st defendant was passed. The trial Court also fixed the asset of the firm as four buildings described in the plaint filed in

O.S.No.34 of 1991, 'A' schedule machineries and 'B' schedule raw materials, semi-finished goods and finished goods including the items mentioned in the inventory list prepared by the Commissioner in Exhibit C3 report. The liability of the firm was fixed at Rs.51,000/- and the amount due to the Union Bank of India, Pattithara Branch and other liabilities shown in the books of account except the liability written in page 66 of Exhibit C7 ledger.

3. The material averments in the plaint were as follows: The plaintiff and defendants were partners of a firm under the name and style 'Anaswara Furniture Company, Mezhathur'. The firm came into being with effect from 3.2.1986. In addition to the plaintiff and defendants, there were three more partners. They were S/Shri.T.K.Divakaran, K.M.Madhavan and A.Damodaran. T.K.Divakaran was the Managing Partner as per the original deed. But, it was stipulated that all documents and instruments with respect to the firm shall be jointly operated by Sri.Divakaran and 1st defendant. For the purpose of running the business, constructing factory, godown, etc., the 1st defendant had given property comprised in R.S.No.113/4 on lease, as per

agreement dated 3.4.1986. The firm constructed four buildings in the property covered by the lease for the purpose of factory, office and godown. The buildings constructed therein are the assets belonging to the firm. The firm acquired several machineries and equipments described in the plaint schedule. Those things also form assets of the partnership. At the time of the commencement of the partnership, each partner had invested an amount of Rs.25,000/- and over and above that amount, advances have been made by some of the partners. Sri.A.Damodaran retired from the partnership on 25.12.1987 and Sri.K.M.Madhavan with effect from 1.6.1988. They were given their shares. The 1st defendant and her husband (who is the 2nd defendant in O.S.No.34 of 1991) started interfering in the management of the business. The Managing Parter - T.K.Divakaran - also retired from the partnership with effect from 12.6.1988 and thereafter the 1st defendant was made the Managing Partner. The share due to T.K.Divakaran was also given. The 1st defendant virtually got unfettered power and started mismanagement of the firm to her advantage. There was large scale misappropriation and diversion of funds. The income

was not properly accounted and the amounts received were misappropriated by the 1st defendant. Union Bank of India, Pattithara Branch advanced a loan of Rs.60,000/- and that amount was not repaid in time. The Bank filed O.S.No.111 of 1989 for recovery of the loan amount. Plaintiff and others made several attempts to inspect the accounts of the firm by a Chartered Accountant, but the 1st defendant kept away and the Chartered Accountant was unable to inspect the books of accounts. The 1st defendant was acting contrary to the trust reposed on her and hence the firm is to be dissolved by a decree and the share of profits is to be fixed and divided. Hence the suit for a decree of dissolving the firm and for winding up the assets of the firm and for partition, division of the share of profits due to the plaintiff.

4. The 1st defendant filed a written statement admitting the formation of the partnership. It was also admitted that T.K.Divakaran was the Managing Partner. It was contended that the accounts were jointly operated with T.K.Divakaran only on account of Clause 13 of the partnership deed dated 3.2.1986. The averment that the firm constructed four buildings in the

property let out by the 1st defendant was denied. It was contended that the firm constructed only two buildings, one workshop building and a shed. It was contended that cattle shed belonging to the 1st defendant and attached to the building where the 1st defendant and family were residing was converted as office of firm and it was not a new construction, but a cattle shed with modification. It was also contended that buildings constructed by firm are not the assets of the partnership. It was contended that all partners of firm had entered into an agreement on 3.4.1986 regarding the buildings constructed by the firm. It was agreed that firm has a right to occupy the premises belonging to the 1st defendant only for 10 years and at the end of the 10th year, buildings and machinery belonging to firm will vest with 1st defendant and other six partners are entitled to 5% each of the value of machinery purchased by firm. It was further provided that if there was default on the part of 1st defendant in paying 5%, machineries are to be sold in public auction and 40% of the amount obtained is to be given to 1st defendant and balance 60% distributed equally among other partners. It was further agreed that if by chance firm was unable

to complete the 10 years, 1st defendant is entitled to assume possession of buildings and premises and firm has right to decide regarding disposal of machineries. It was contended that buildings constructed by firm were not the assets of the firm. The averment that the 1st defendant started interfering with the working of the firm was denied. Sri.T.K.Divakaran retired from the firm not because of the attitude of 1st defendant, but only because of personal reasons. There was no mismanagement or misappropriation or diversion of funds as alleged. The averment that 1st defendant did not permit the Chartered Accountant to inspect the accounts was also denied. Assets shown in plant-B schedule were not the assets of firm. It was contended that from 1987 onwards firm did not purchase any raw material. The firm was only collecting charges for manufacturing furniture using the raw-materials supplied by the customers. It was further contended that articles noted in the inventory by Commissioner were not assets of firm. The raw materials available in the year 1987 were valued and were taken by Siddique, who was one of the partners. It was contended that though he agreed to replace the raw materials, he failed to do so. Siddique had agreed to

discharge the loan amount due to Union Bank of India, Pattithara Branch, but he did not pay any amount. The Bank filed the suit. When Damodaran retired, he was given an amount of Rs.11,000/- as his share out of raw materials and finished goods. It was also contended that 1st defendant and her daughter had advanced huge amounts to firm as loan and they were entitled to recover it from the firm. So, she prayed for dismissal of the suit.

5. Defendants 2 and 3 filed a written statement supporting the case of the plaintiff. It was contended that defendants 2 and 3 have no objection for dissolution of partnership and directing the 1st defendant to render accounts. Defendants 2 and 3 are also entitled to get their share on dissolution. Assets mentioned in the plaint are assets of firm. 1st defendant was not entitled to any special consideration. Agreement dated 3.4.1986 was not binding on firm and unenforceable as it was executed against express terms of partnership deed. Any agreement entered into by firm and strangers can only be in accordance with the provisions of the deed. Any matter for which no provision was made in the partnership deed shall be decided by parties and shall be

recorded in the minutes book. Agreement dated 3.4.1986 was not discussed and recorded in the minutes book and as such it was not binding on firm. All records were with 1st defendant, who was the Managing Partner of firm. Minutes book was suppressed by 1st defendant. It became impossible to continue the partnership due to mismanagement and misappropriation by 1st defendant. It was also contended that 2nd defendant had advanced an amount of Rs.51,000/- to firm as per the terms of the deed and he was entitled to get back that amount with 12% interest in addition to the share in the assets of firm.

6. The Court below raised the following issues:

"(1) What are the assets belonging to the firm?

(2) What are the liabilities of the firm?

(3) Whether the first defendant is liable to render accounts?

(4) What is the proper order as to costs?"

A.S.No.220 of 1994

7. The plaintiff in O.S.120 of 1990 filed another suit, O.S.No.34 of 1991 for a declaration and consequential

injunction. In the plaint in O.S.No.34 of 1991, it was averred that plaintiff along with defendants 1, 3, 4 and others formed a partnership firm in the year 1986 by name 'Anaswara Furniture Company' and started functioning. It was for manufacturing and sale of furniture. It was averred that for starting unit, firm had availed a loan from Union Bank of India, Pattithara. It became necessary to construct buildings for housing factory, godown, office, etc. for establishing the factory. The suit properties originally belonged to 2nd defendant, husband of 1st defendant. He assigned suit properties in favour of 1st defendant who, in turn, entered into an agreement with other partners of firm. It was decided to construct buildings in a plot earmarked by 1st defendant for that purpose. A factory building, an office-cum-godown and two godowns were constructed in that property and all the four buildings are the assets of partnership firm. The firm alone is entitled to those four buildings. It was averred that difference of opinion arose between partners and three partners retired. 1st defendant became Managing Partner. It was also averred that since functioning of partnership firm became impossible, plaintiff filed O.S.No.120 of 1990 for dissolution of

partnership firm and rendition of accounts and that suit was pending. It was contended that buildings bearing door numbers IX/218, IX/219, IX/220 and IX/221 of Trithala Panchayat were constructed by firm. Those buildings were assessed in the name of 1st defendant in her capacity as a partner of firm. It was contended that 1st defendant resides in building bearing door Nos.IX/217 and IX/217(a) and those buildings were assessed in the name of 2nd defendant. It was averred that in order to defeat the interest of other partners of firm, defendants 1 and 2 tried to alienate the four buildings and land in which these buildings are situated. It was contended that attempt of defendants was to sell the land and buildings as that of 2nd defendant. Hence, suit for a declaration that the land and four buildings situated therein are assets of firm and defendants 1 and 2 have no right to alienate that land or buildings.

8. 2nd defendant alone filed a written statement. It was contended that suit was not maintainable. Description of plaint schedule properties was not correct. It was admitted that 30½ cents of property, shown as item No.1 in the plaint schedule, was assigned by 2nd defendant in favour of 1st defendant on

12.2.1986. It was contended that property scheduled in the plaint was not the property assigned. It was contended that property shown as item No.2 in plaint schedule was not sold by 2nd defendant to 1st defendant. It was contended that building bearing door Nos.IX/218 and IX/221 do not belong to firm and those buildings are absolute properties of 2nd defendant. It was contended that partners of the firm had entered into an agreement on 3.4.1986 to construct buildings in 30½ cents belonging to 1st defendant. It was further agreed that duration of the agreement was ten years and after expiry of ten years, buildings, machinery, etc. should vest with 1st defendant and 5% each of the purchase amount of machineries alone need be paid to the other partners. In case 1st defendant is not willing, machineries can be sold and 40% of the sale consideration should be given to 1st defendant and remaining 60% to other partners. In case firm ceased to function before the expiry of ten year period or if it was found that it was not possible to continue the business, land and buildings can be taken possession by 1st defendant. It was further contended that the firm become defunct before the period of ten years and in view of the provisions

contained in the agreement dated 3.4.1986, the 1st defendant is entitled to take possession of the buildings and land and the other partners cannot resist the same. The plaintiff was not entitled to get a decree of injunction. The firm had constructed one workshop building and one shed. Two godowns were not constructed by firm, but by 2nd defendant. It was further contended that 2nd defendant was not staking any claim for assets of partnership and he had no intention to sell assets belonging to firm and as such plaintiff is not entitled to get any decree as prayed for and prayed for dismissal of the suit.

9. The trial Court raised the following issues:

"(1) Whether the suit is not maintainable?

(2) Whether the description, measurements and boundaries of item No.1 as shown in the plaint is correct?

(3) Whether the plaintiff is entitled to get a decree for declaration as prayed for?

(4) Whether the plaintiff is entitled to get a decree for perpetual injunction as prayed for?

(5) Whether the Anaswara Furniture Company has any right or possession over the four buildings inclusive of Nos.9/218 and 9/221 as mentioned

in the plaint?

(6) Whether the agreement executed on 3.4.1986 as alleged in the written statement of the second defendant is true and binding upon the plaintiff?

(7) Whether the cause of action as alleged is true and actionable?

(8) Whether the plaintiff is entitled to any relief as prayed for?

(9) What is the proper order as to costs?".

10. Both these suits were jointly tried. Evidence was recorded in O.S.No.120 of 1990. P.Ws.1 to 8 were examined on the side of plaintiff and D.W.1 was examined on the side of the defendant. Exhibits A1 to A26 were proved and marked on the side of the plaintiff and Exhibits B1 to B40 on the side of the defendants. Exhibits C1 to C9 were marked as Court Exhibits. Exhibits X1 to X6 were also marked. After appreciating the evidence on record, the trial Court passed a preliminary decree in O.S.No.120 of 1990. In O.S.No.34 of 1991, a decree was passed declaring that four buildings standing in plaint schedule property belonged to firm. Defendants 1 and 2 were restrained by a

decree of prohibitory injunction from alienating the plaint schedule item No.1 till realisation of shares of plaintiff and other supporting defendants after passing a final decree in O.S.No.120 of 1990. Challenging the decree and judgment passed in O.S.120 of 1990, A.S.No.376 of 1993 is filed. A.S.No.220 of 1994 is filed challenging the decree and judgment in O.S.No.34 of 1991.

11. In O.S.No.120 of 1990, the plaintiff had impleaded three partners of the firm as defendants 1 to 3. In O.S.No.34 of 1991, husband of 1st defendant in O.S.No.120 of 1990 was arrayed as 2nd defendant. Defendants 2 and 3 in O.S.No.120 of 1990 were arrayed as defendants 3 and 4.

12. Learned counsel appearing for appellants strenuously argued before me that finding of the Court below that four buildings standing in the property of appellants in A.S.No.220 of 1994 are assets of the firm is wrong and against the documentary evidence available on record. It is argued that learned Sub Judge failed to appreciate evidentiary value of Exhibit B1 dated 3.4.1986 and had that document been properly construed, there was no scope for any decree being passed in O.S.No.34 of 1991 against the appellants. It was also contended

that in the preliminary decree passed in O.S.No.120 of 1990 for dissolution of firm and rendition of accounts, Court below had already considered what are the assets and liabilities of firm and thereby limited the scope of final decree proceedings.

13. The main point arising for consideration in A.S.No.220 of 1994 is whether finding of the Court below that four buildings were constructed by the Anaswara Furniture Company and those are assets of firm is correct. Admittedly on 3.2.1986 Exhibit A1 partnership was entered into between parties. There were seven partners. In addition to the plaintiff and defendants 1 to 3 in O.S.No.120 of 1990, there were three more partners. They were S/Shri.T.K.Divakaran, K.M.Madhavan and A.Damodaran. Damodaran retired on 25.12.1987, Madhavan on 1.6.1988 and Divakaran on 12.6.1988. After forming partnership, partners of firm executed Exhibit B1 agreement. In paragraph 2 of the plaint filed in O.S.No.120 of 1990, there was an averment to the effect that firm had entered into a lease arrangement with 1st defendant and 1st defendant let out property belonging to her and in that property four buildings were constructed. The appellants in A.S.No.220 of 1994 had not stated

as to what exactly was the nature of the agreement entered into between herself and the other partners of firm under Exhibit B1. It is admitted by defendants 1 and 2 in O.S.No.34 of 1991 that property comprised in R.S.No.113/4 originally belonged to 2nd defendant and he assigned that property to 1st defendant on 12.2.1986. In Exhibit B1 it was agreed that firm can construct buildings in the property. There is no mention as to how many buildings are to be constructed. It was also stated that such buildings can be used only for running business of firm and it cannot be used for any other purpose. Period of agreement was limited to ten years. It was further stated that on the expiry of ten years, the title of land and the buildings constructed by the firm and also the machineries erected in those buildings will vest with the 1st defendant. It was further admitted that at that point of time, she shall pay 5% of the purchase price of machinery to each of the partners and in case she commits default, machineries are to be sold and 40% of the sale consideration will be given to her and remaining 60% will be divided among other partners. The relevant portion of the agreement reads as follows:

It was further stated that if firm want to occupy premises beyond the period of ten years, a fresh agreement is to be executed. But, without the permission of 1st defendant, firm cannot continue to do business in the land and 1st defendant has a right to recover the property and buildings. The relevant portion reads as follows:-

It was further provided that in case the firm is wound up or it becomes impossible to continue the business, 1st defendant can recover the land and buildings and if such a contingency arises,

the firm will have the right to decide as to what should be done with the machinery. The clause reads as follows:

The appellants contended that only two of the buildings were constructed by firm and remaining two buildings were old buildings constructed by 2nd appellant in A.S.220 of 1994 in his property. It was also contended that these buildings are not the assets of the firm in view of the provisions contained in Ext.B1.

14. Learned counsel appearing for the appellants has strenuously argued before me that in view of specific provision contained in Exhibit B1 that title of land and buildings vest with 1st defendant, finding of the Court below that it is an asset of firm is wrong and illegal.

15. In Exhibit B1 no schedule, no measurements and no boundaries of the property assigned are stated. It was stated that area of land assigned is 30½ cents. Appellants admit that buildings bearing door Nos.IX/219 and IX/220 were constructed by firm. According to them, buildings bearing door Nos.IX/218 and IX/221 were constructed by 2nd appellant in A.S.No.220 of 1994. The evidence on record shows that construction of the building started even prior to the execution of Exhibit B1 and on the date of execution of Exhibit B1, construction of buildings were nearing completion. Building bearing door No.IX/219 was used as factory, door No.IX/218 was office-cum-godown and door Nos.IX/220 and IX/221 were godowns. Exhibit A3 account was written by D.W.1 in his own handwriting. It shows that preliminary work of construction started as early as in November, 1985. Though it was contended that buildings were constructed using the materials of old building, the same was not proved. Exhibit C7 is the accounts of the firm which shows that on 30.3.1986 an amount of Rs.14,280/- was spent for construction. Exhibit C7 shows that value of the buildings was Rs.1,71,354.40 as on 31.3.1987. Exhibit X2 is a file in relation to the firm kept in

the office of the Executive Engineer, Buildings Division, P.W.D., Palakkad. The firm claimed subsidy and other benefits and for that purpose, assets of firm were valued. The P.W.D. had valued the four buildings bearing door Nos.9/192A, B and C constructed in April, 1986 and 9/220 constructed in April, 1987. Exhibit X2 file contains two certificates issued by the Executive Officer of Trithala Panchayat, which shows that building bearing door Nos.9/192A, B, C and 9/220 are owned by the 1st defendant in her capacity as Managing Partner of firm. It also shows that building bearing door Nos.9/192 is a residential building belonging to D.W.1. Exhibit X2 also contains a sketch showing the location of four buildings belonging to firm. That was prepared by the Assistant Engineer, P.W.D. Buildings Division and countersigned by Assistant Executive Engineer, P.W.D. Exhibit C2 is a file maintained by the District Industries Centre, Palakkad in respect of the firm. The certificate of registration shows that the location of the factory is in building No.9/192A, B and C of Trithala Panchayat. The value of the buildings fixed therein was Rs.1,71,354.50. It is to be noted that same was the value of the building as per Exhibit C7 records. Exhibit A25 is a true copy of

the Panchayat Building Tax Assessment Register. It shows that buildings bearing door No.9/217 and 9/217A are owned by Gopalan Nair, 2nd appellant in A.S.No.220 of 1994. Buildings bearing door Nos.218, 219, 220 and 221 are assessed in the name of C.Radha, Anaswara Furniture Company. Building bearing door No.217A is assessed in the name of Suresh, the son of the appellants. Exhibits A2 to A4 are demand notices of building tax of the four buildings. It was issued to C.Radha, partner of the firm. Exhibit C3 report and Exhibit C6 plan show that only two of the buildings were constructed within the 30½ cents mentioned in Exhibit B1 and other two buildings were constructed in the property owned by 2nd appellant in A.S.No.220 of 1994. Going by terms of Exhibit B1, permission granted was to construct buildings required for firm in property mentioned in that document. But, the evidence on record will show that two of the buildings are situated outside the property mentioned in Exhibit B1. As I have already stated, defendants-appellants had admitted that two of the buildings were constructed by firm. Their case that the other two buildings belong to the 2nd appellant in A.S.No.220 of 1994 is not established. On the other hand, the

materials on record prove beyond any reasonable doubt that all four buildings were constructed by firm. D.W.1 is 2nd appellant in A.S.No.220 of 1994. The materials on record show that he was looking after the affairs of the firm. So, appellants were aware of the fact that two of the buildings constructed by firm were not within the property covered by Exhibit B1 and it was constructed outside that property. The finding of the trial Court that the four buildings were constructed by the firm is perfectly correct and does not call for any interference. I confirm that finding.

16. The next question that arises for consideration is whether the four buildings can be treated as assets of the firm. The trial Court had found that those buildings are asset of the firm, but the land does not belong to the firm. Even in Exhibit B1 agreement no land was assigned in favour of the firm. Firm was given permission to construct necessary buildings in the land. Exhibit C7 account shows that the firm had spent Rs.1,71,354.40 for construction of the four buildings. That was corroborated by the materials contained in Exhibit X2 file also. The Department had also fixed the value of the buildings as Rs.1,71,354.40. Exhibit A10 is an interim profit and loss account for the period

ended 31st May, 1988 prepared at the time of retirement of Sri.Madhavan. It shows that the value of the buildings was fixed as Rs.1,38,797/- and after giving depreciation of 10% for two months, the value was fixed at Rs.1,36,484/-. Madhavan was given share of profits taking into account of the value of the buildings also. This was not objected to by the 1st defendant, who was a partner. So, she, as partner, had admitted that the buildings belong to the firm and the value of the same will come as fixed in Exhibit A10. So, the finding of Court below that four buildings are the assets of the firm is correct and I confirm that finding.

17. The next question arising for consideration is whether the defendants 1 and 2 in O.S.No.34 of 1991 are entitled to take possession of the land and buildings without paying any compensation. The learned counsel appearing for the appellants has strenuously contended before me that the finding of the Court below that if it is found that the buildings will vest with the 1st defendant, it will cause unforeseen loss and hardship to other partners is against the evidence on record. It is argued that the parties on their own accord had entered into Exhibit B1

agreement by which they had solemnly undertaken to surrender the land and buildings free of cost in case the business is wound up before the expiry of ten year period. The learned counsel appearing for the 1st respondent-plaintiff had contended that the defendants 3 and 4 in O.S.No.34 of 1991 had raised a contention in O.S.120 of 1990 to the effect that Exhibit B1 is inoperative and not binding on the partners. It was contended that Clause 25 of the original partnership deed provides that all matters for which no provision is made in the original partnership deed shall be decided by the partners and shall be recorded in a minutes book. It was contended that clauses of Exhibit B1 agreement were never discussed by partners and recorded in minutes book and as such there is violation of clause 25 of the partnership deed and hence it is not binding on firm. It is also argued that a reading of Exhibit B1 shows that other partners had agreed to surrender the buildings without receiving any compensation only in case the firm is doing business for the full term of ten years. It is argued that even though no rent was fixed, D.W.1 had admitted that if the land covered by Exhibit B1 was leased out, it would fetch a rent of minimum Rs.700/- per mensem. It is argued that if firm

occupies the land for ten years, the probable rent for that period will be a sufficient compensation for the buildings and that is the reason why parties had undertaken to hand over the buildings to 1st defendant without receiving any compensation after the expiry of ten years. It is argued that though parties had agreed that the 1st appellant in A.S.No.220 of 1994 can recover the building, there was no understanding to the effect that she need not pay the value of the building. It is contended that a perusal of Exhibit A10 will show that when Madhavan retired, the 1st defendant also agreed to treat the value of the buildings as asset of the firm and gave a share to Madhavan. Hence, it is argued that 1st defendant is estopped from raising a contention that she is entitled to recover the buildings without paying any compensation.

18. Exhibit A1 is the deed of partnership. Exhibit B1 is an agreement entered into between the partners by which the 1st defendant allowed the firm to erect buildings in the property covered by Exhibit B1. The evidence on record shows that the firm owns four buildings. Two of the buildings situate in that property and two other buildings outside that area. No rent was fixed under Exhibit B1. There is dispute regarding the nature of

the transaction also. Exhibit B1 contains the word " ", which means that 'for rent'. But, according to the counsel for the plaintiff, that was a subsequent interpolation and in the draft prepared will make it clear that there was no such understanding. In the plaint filed in O.S.No.120 of 1990 there was an admission to the effect that land was taken on rent by firm. It is argued that understanding was to the effect that if firm had occupied the building for ten years, the buildings and machineries will be given to the 1st defendant in lieu of consideration of using the land. But, even in that case she had agreed to pay 5% of the purchase value of the machineries to each of the six partners. It is further provided that in case she fails to pay that amount, the machineries are to be sold and she is entitled to get 40% of the sale consideration and balance 60% to remaining partners. It is true that there is yet another clause in Exhibit B1 agreement, which says that if the firm was wound up before the expiry of ten year period or it is impossible to conduct the business before the expiry of the term, 1st defendant can take possession of the land and building. Exhibit B1 is silent whether in such a contingency the appellants are liable to pay the value of the buildings or not.

It is also to be noted that there is difference in the mode of taking over of the land and buildings before and after the period. If it is after ten years 1st appellant can recover land and buildings on the strength of her title, but if it is before ten years, the agreement only says that she can recover the land and buildings. It is argued that such recovery can be only through a Court of law. Whether the appellants can take possession of the buildings without payment of compensation is the moot question to be decided.

19. I am of the view that that question does not arise for consideration in this case. Even assuming that the partnership had functioned for ten years and thereafter the 1st defendant wanted to terminate the relationship, it is doubtful whether she can enter into the land and reduce the land and buildings into her possession. Any way, that question does not arise in this case. The appellants in A.S.No.220 of 1994 cannot take law into their hands and for forcibly take possession of the buildings. They can take possession of the land and buildings only through due process of law. They will have to approach a competent Court of law for getting possession of land and buildings. In that

proceedings what exactly is the relationship between the 1st appellant and other partners will have to be decided. The question whether the appellants are liable to pay value of the buildings, etc. is also a matter to be decided in that proceedings. There is no counter-claim or cross suit claiming possession of the buildings and land. That question need not be considered in this proceedings. So the finding of the Court below that the appellant are liable to pay the value of the buildings is left open to be decided in appropriate proceedings.

20. The trial Court passed a decree of injunction restraining the defendants 1 and 2 from alienating the property till a final decree in O.S.120 of 1990 is passed. I do not think, it is just and proper to wait till the dispute between the partners *inter se* is settled. It is true that the 1st appellant is also a partner of the firm, but 2nd appellant is not a partner. So, the decree of injunction is to be limited by holding that the firm is entitled to be in possession of the buildings and property until and unless the firm and its partners are duly evicted under due process of law. So, the decree passed in O.S.No.34 of 1991 is to be modified accordingly.

21. In A.S.No.376 of 1993, the trial Court has passed a preliminary decree for dissolution of the partnership. Originally there were seven partners. Three of them had already retired. The stand taken by the partners in O.S.No.120 of 1990 makes it evidently clear that it is not possible for the firm to continue the business. There is no trust or faith among the partners. They are making allegations and counter allegations. So, it is absolutely necessary to dissolve the partnership. So, the preliminary decree passed by the trial Court dissolving the firm is correct and only to be confirmed.

22. The learned counsel appearing for the appellant has argued that the decree passed by the trial Court in O.S.No.120 of 1990 by which it directed not to take into account of the amount due to 1st appellant and her daughter and also to include the articles mentioned in the inventory list is not correct. It is argued that more than Rs.25,000/- with interest is due to the daughter of the appellants and that is clear from the accounts book. The trial Court found that the 2nd defendant had made a claim that he had advanced an amount of Rs.51,000/- to the firm and that claim is not disputed by anybody. While dealing with the

connected appeal, I had found that assets of the firm includes the value of the four buildings constructed by the firm in the property of defendants 1 and 2 in O.S.No.34 of 1991 and that value shall also to be added as asset of the firm. There is dispute regarding the amount claimed by the 1st defendant and also the liability to account the raw materials, semi-finished goods, finished goods, etc. According to me, the Court below ought to have directed the 1st defendant to furnish the accounts and permitted any of the parties to apply for passing a final decree after taking into account of the assets and liabilities. A perusal of the decretal portion of O.S.120 of 1990 shows that there was no direction to the plaintiff or other contesting defendants to apply for passing a final decree. Since the proper time for considering the assets and liabilities of the firm is at the time of passing of the final decree, I am of the view that two disputed findings, that is to say – one regarding the amount which according to the 1st defendant is due to her daughter and also the direction to include the articles mentioned in the inventory list, etc. - are left open to be decided in the final decree proceedings. So, those findings are also set aside. I make it clear that those findings are set aside not on

account of the fact that the reasoning given by the trial Court is wrong, but only on the fact that it is a matter to be decided at the time of passing of the final decree. Since it was necessary to decide the ownership and value of the four buildings for passing a decree in O.S.No.34 of 1991, that finding will be incorporated in O.S.No.120 of 1990 as one of the assets of the firm. There was no dispute with regard to the amount due to the 2nd defendant. That amount is to be included in the liabilities of the firm. The other two findings regarding the claim by the 1st defendant for an amount of Rs.25,000/- to her daughter and also the decree to include the items mentioned in inventory list are only to be set aside. It is made clear that is open to the trial Court to come to the same conclusion in case the evidence warrants such a conclusion.

In the result, the appeals are allowed in part. The declaratory part of the decree passed in O.S.No.34 of 1991 is confirmed. The injunction decree is modified. Defendants 1 and 2 in O.S.No.34 of 1991 are restrained by a decree of prohibitory injunction from forcibly evicting the firm and its partners until and unless the firm is evicted from the buildings and land under

due process of law. The preliminary decree passed in O.S.No.120 of 1990 for dissolution of the partnership is confirmed. 1st defendant shall render accounts. It is open to any one of the parties to apply for appointment of a Commissioner to examine the accounts and also to prepare the assets and liabilities of the firm so as to enable the trial Court to pass a final decree. While fixing the assets, the value of the four buildings shall be treated as the assets of the firm and amounts due to the 2nd defendant in O.S.No.120 of 1990 shall be shown as one of the liabilities. No costs. C.M.P.No.2075 of 1993 in A.S.No.376 of 1993 shall stand dismissed.

K.Padmanabhan Nair
Judge

vku/-